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SOUTHERN DISTRICT OF CALIFORNIA  
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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

EDUL JINNAH AZEEZ, II,  
Petitioner,  
v.  
MATTHEW CATE and KAMALA  
HARRIS,  
Respondents.

CASE NO. 12cv1832-WQH-WMc

**ORDER**

HAYES, Judge:

The matter before the Court is the Report and Recommendation issued by Magistrate Judge Nita L. Stormes ( ECF No. 19), and the Petition for Writ of Habeas Corpus filed by Petitioner Edul Jinnah Azeez, II. (ECF No. 1).

**I. Background**

On July 25, 2012, Petitioner, a prisoner proceeding *pro se*, filed the Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. section 2254 challenging the sentence imposed by the San Diego County Superior Court in case number SCD220467. (ECF No. 1). Petitioner raises seven claims. In claims one through six, Petitioner lists aggravating factors relied on by the sentencing court in imposing the upper-term sentence that Petitioner alleges were improper. In claim seven, Petitioner alleges that he was denied his Fourteenth Amendment right to Equal Protection when the

1 sentencing judge “sentenc[ed] similarly-situated defendants to highly disparate  
 2 sentences based on race.” *Id.* at 15.

3 On July 11, 2013, Respondent filed an Answer to the Petition. (ECF No. 16).

4 On August 5, 2013, Petitioner filed a Traverse. (ECF No. 18).

5 On August 16, 2013, the Magistrate Judge issued the Report and  
 6 Recommendation. (ECF No. 19). The Magistrate Judge reviewed each of the  
 7 Petitioner’s claims and recommended that this Court deny the Petition for Writ of  
 8 Habeas Corpus.

9 On September 10, 2013, Petitioner filed objections to the Report and  
 10 Recommendation. (ECF No. 20). Petitioner contends that he is entitled to Habeas  
 11 Corpus relief because he “has proven that the State Court decision(s) was not only  
 12 ‘contrary to or involved an unreasonable application of clearly established federal law’;  
 13 but more importantly, it was ‘based on an unreasonable determination of the facts in  
 14 light of the evidence presented.’” *Id.* at 3. Petitioner contends that the sentencing  
 15 judge relied on improper aggravating circumstances that were not legally justified. *Id.*  
 16 at 3. Petitioner contends that his “‘Equal Protection’ under our ‘Fourteenth  
 17 Amendment’ was clearly violated in the adjudication of this matter, and such is  
 18 conspicuously evident in the record, as was more than set forth in the Petition.” *Id.*

## 19 **II. Standard of Review**

20 The duties of the district court in connection with a magistrate judge’s report and  
 21 recommendations are set forth in Rule 72 of the Federal Rules of Civil Procedure and  
 22 28 U.S.C. section 636(b)(1). The district court must “make a *de novo* determination  
 23 of those portions of the report ... to which objection is made,” and “may accept, reject,  
 24 or modify, in whole or in part, the findings or recommendations made by the  
 25 magistrate.” 28 U.S.C. §636(b)(1); *see also U.S. v. Remsing*, 874 F.2d 614, 617 (9<sup>th</sup>  
 26 Cir. 1989).

## 27 **III. Discussion**

28 The Court has reviewed the Lodgments, the Petition, the Report and

1 Recommendation, and the objections in their entirety.

2 In his objections, Petitioner contends that improper aggravating circumstances  
3 were relied on in sentencing that were not legally justified. (ECF No. 20). “[U]nder  
4 California law, only one aggravating factor is necessary to set the upper term as the  
5 maximum sentence.” *Butler v. Curry*, 528 F.3d 624, 643 (9th Cir. 2008). Once the  
6 upper term is set as the maximum sentence, the imposition of the lower, middle, or  
7 upper-term sentence “is [] discretionary and does not depend on the finding of any  
8 aggravating factors.” *Id.* at 652 n.20. This principle is not contrary to or an  
9 unreasonable application of federal law. *See Butler*, 528 F.3d at 642-43; *Kessee v.*  
10 *Mendoza-Powers*, 574 F.3d 675, 676 n.1 (9th Cir. 2009). Because at least one of the  
11 aggravating factors relied on by the sentencing judge was established in a manner  
12 consistent with the Sixth Amendment, Petitioner’s sentence does not violate the  
13 Constitution. *See Butler*, 528 F.3d at 643. Petitioner’s objection relating to claims one  
14 through six is overruled.

15 In his objections, Petitioner contends that his Fourteenth Amendment right to  
16 Equal Protection was “clearly violated in the adjudication of this matter, as was set  
17 forth in the Petition.” (ECF No. 20 at 3). Petitioner alleges that the sentencing judge  
18 made an “insensitive and inappropriate” remark, which indicated that Petitioner was  
19 sentenced more harshly based on his race and serves as the basis of his equal protection  
20 claim. (ECF No. 1 at 15). After review of the record, there is no evidence that the  
21 judge imposed a harsher sentence due to race. The record reflects that the judge took  
22 into account the circumstances of each individual defendant and relied upon legitimate  
23 legal and factual bases for Petitioner’s sentence. Accordingly, the state court’s finding  
24 that the comment made by the sentencing judge did not substantiate Petitioner’s claim  
25 of racial bias and discrimination was not an unreasonable determination of the law or  
26 the facts. Even under an independent review of the record, the judge’s comment does  
27 not evidence any racial bias, particularly when there are legitimate legal and factual  
28 bases for Petitioner’s sentence. Petitioner’s objection relating to claim seven is

1 overruled.

2       The Court concludes that Petitioner has failed to demonstrate that any of the  
 3 California courts' decisions denying his claims “[were] based on an unreasonable  
 4 determination of the facts in light of the evidence presented in the State court  
 5 proceeding,” or “[were] contrary to, or involved an unreasonable application of, clearly  
 6 established Federal law.” 28 U.S.C. § 2254(d). Accordingly, the Petition is denied.

7 **IV. Request for Evidentiary Hearing**

8       Petitioner argues that an evidentiary hearing is required to address the issues in  
 9 his petition. (ECF No. 18 at 3). “An evidentiary hearing is *not* required on issues that  
 10 can be resolved by reference to the state court record.” *Totten v. Merkle*, 137 F.3d  
 11 1172, 1176 (9th Cir. 1998) (emphasis in original); *see also Cullen v. Pinholster*, 131  
 12 S.Ct. 1388, 1398 (2011). The Court is able to resolve Petitioner’s sentencing error  
 13 claims by reference to the state court record, and therefore Petitioner’s request for an  
 14 evidentiary hearing is denied.

15 **V. Certificate of Appealability**

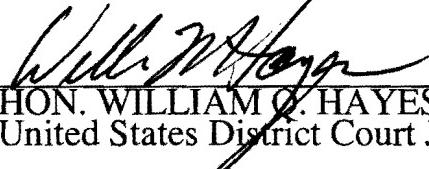
16       Pursuant to Rule 11 of the Federal Rules Governing Section 2254 Cases, “[t]he  
 17 district court must issue or deny a certificate of appealability when it enters a final  
 18 order adverse to the applicant.” A certificate of appealability should be issued only  
 19 where the petition presents “a substantial showing of the denial of a constitutional  
 20 right.” 28 U.S.C. § 2253(c)(2). “[A] [certificate of appealability] should issue when the  
 21 prisoner shows ... that jurists of reason would find it debatable whether the petition  
 22 states a valid claim of the denial of a constitutional right and that jurists of reason  
 23 would find it debatable whether the district court was correct in its procedural ruling.”  
 24 *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

25       The Court finds that jurists of reason could find it debatable whether the Petition  
 26 states a valid claim of the denial of a constitutional right with respect to Petitioner’s  
 27 claim seven for denial of Equal Protection. Accordingly, the Court grants a Certificate  
 28 of Appealability on claim seven of the Petition.

1     **VI. Conclusion**

2       IT IS HEREBY ORDERED that (1) the Report and Recommendation (ECF No.  
3       19) is ADOPTED in its entirety; and (2) the Petition for Writ of Habeas Corpus (ECF  
4       No. 1) is DENIED. A certificate of appealability is granted as to claim seven of the  
5       Petition. The Clerk of the Court shall enter judgment in favor of Respondents.

6       Dated: 11/5/13

  
7       HON. WILLIAM O. HAYES  
8       United States District Court Judge

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